United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1140

Docket No. 76-1306

B P/S

In The

United States Court of Appeals

For the Second Circuit

UNITED STATES OF AMERICA,

Appellee,

— *v* —

MICHAEL J. TICHE,

Appellant.

On Appeal From a Judgment of The United States District Court for the Northern District of New York

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REPLY BRIEF OF DEFENDANT, Michael J. Tiche

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REPLY BRIEF OF DEFENDANT MICHAEL J. TICHE

Defendant's main brief was filed on October 4, 1976. Nine days later, this Court decided United States v. Didier, slip opin. October 13, 1976, docket no. 76-1331.

The Didier decision dealt specifically with the issues raised on the instant appeal and, it is submitted, is dispositive. This Court there strongly enunciated its ruling that if the interim retrial rules "are to mean anything they must be enforced." (p. 87).

In the Didier case, the defendant's first trial in 1973 resulted in a hung jury. At that time, the now superceded

rules pertaining to retrials were in effect, but on September 29, 1975, the revised Interim Plan, reducing the allowable period between mistrial and retrial to 60 days and eliminating extensions for good cause became binding. Didier's retrial did not commence until April 12, 1976.

In reversing the conviction and remanding the case for dismissal of the indictment, this Court noted that:

1) The case was not one of first impression. The decisions in Drummond, Roemer and Yaqid* "placed the handwriting in bold letters on the wall" (p.87) that the responsibility of the Government and the district courts to start retrials within 60 days must be complied with.

2) The responsibility is not the defendant's but the court's. "The Southern District's Plan, unlike the Second Circuit's Rules... places the primary responsibility for speedy trials on the district courts and on the government...Indeed, the new plans, unlike the superceded Second Circuit Rules, state specifically that 'the court has sole responsibility for setting and calling causes for trial'."(p. 85)

3) A demand by defendant is not required (p. 85) and even a request for delay made by defendant after the time has run does not vitiate the failure to commence trial on time ("Didier himself requested an adjournment from March 8 to April 12 for business reasons" p. 79).

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* United States v. Drummond, 511 F.2d 1049 (2d Cir. 1975)
United States v. Roemer, 514 F.2d 1377 (2d Cir. 1975)
United States v. Yaqid, 528 F.2d 962 (2d Cir. 1976)
All of these decisions are cited and relied upon by defendant in his main brief herein.

4) If the government desires to commence a retrial at a date later than the rules allow, it is "...first obligated to seek an explicit waiver from the defendant... and, whether or not the waivers were obtained, to apply to the court for permission for such an extension before the applicable deadline had passed. The Court, in turn, could grant permission only if the requested permission would be consistent with the applicable speedy trial rules." (p. 86, emphasis that of the Court.)

In the instant case, part of the message got across, but there was a fatal lack of follow-through by the court and the government in Connecticut.

Immediately after the jury disagreement on February 11, 1976, Judge Newman granted a mistrial and brought to the government's attention the requirement of a speedy trial, and the government responded that it was prepared to go forward in 60 days. (A 9).

Eight days later, on February 19, defendant's Connecticut counsel filed a motion to withdraw -- certainly a warning signal in moving the case promptly.

Despite this, the Court did not speedily decide the application, but set a schedule that put off even the filing of all motions to March 26. This left a gap, ordered by the

Court, from February 19, when counsel indicated his desire to withdraw, until March 26, before a hearing could be held on it. This was a 36-day period of total inactivity. During this time, the government was mute.

The Record here shows that both the Connecticut district court and the government, although aware of the running of the required 60-day period, let most of that time slip by and then were unsuccessful in obtaining any waiver from defendant. Indeed, when the motions finally were argued on March 29, 1976, defendant's attorney said he was "not about to waive" any speedy trial rights. (A 55)

The heart of the government's attempt to evade the requirement of commencing a retrial within the time set by the district plan rule is its statement in its brief that

> "If defendant's strict construction is applied, then his filing motions, his requesting delay and the court delays in accommodating defendant's rights and interests can prevent a retrial while the court takes the time to act on defendant's various motions. It is, of course, defendant's right to make and have such motions decided. However, to permit the time required for those procedures to exhaust the sixty (60) days period and thus preclude a retrial is to put in the defendant's hands the fate of his retrial." (Government brief, p. 108)

This completely blots out the responsibility of the court, no matter what defense motions are raised, to schedule and consider them promptly, in order to meet the "command" of the Interim Plan to commence retrial within 60 days. Here the court did not even hear arguments on any defense motions until March 29, 1976, by which time 47 of the 60 days had elapsed This was not defendant's fault. The responsibility was that of the court -- of which it had expressed its awareness the day of the jury disagreement. (A 9).

As to the rest of the government's assertions that to require compliance with the time limit of the Plan would be "absurd", the short answer is that given by this Court in Drummond:

> "The difficulty with the Government's position is that the language of (the Rule)...is squarely against it." (511 F.2d at 1051)

A misstatement in the Government's brief must be corrected. At page 106, it is stated:

> "The Indictment was filed in the Northern District on April 13, 1976, pursuant to the Order of Transfer, and Mr. Quinlan was assigned to represent Michael Tiche on April 14, 1976. Without voicing any objection, Mr. Quinlan was granted until May 17, 1976 to file motions and to be prepared to argue them. Thereafter, defendant filed, among others, a Motion to Dismiss on May 12, 1976." (emphasis supplied).

This conveys the impression that defendant's New York counsel did not raise the failure of compliance with the Interim Plan from April 14, 1976 until May 17, 1976. This is wrong and factually incorrect. The misstatement is not deliberate, but stems from the fact that the Assistant United States Attorney who was in charge of the case at the times involved, William F. Dow, III, left the United States Attorney's Office and is not among counsel who wrote the Government's brief.

As noted in the Opinion of the court below, New York counsel was assigned on April 14, 1976 and on April 19, 1976 a preliminary conference was held in Judge Werker's chambers in New York, attended by New York counsel and Mr. Dow. (A 116)

The fact is that on that early date, defendant's counsel specifically raised the issue of the failure of compliance with the speedy retrial rule, and indeed, read that rule verbatim. By that time, of course, the 60 days had already run, and the court set May 17, 1976 for a hearing on a written motion based on this, and other issues. As expressly noted in the opinion below, counsel requested a continuance of the trial date to June 7, 1976 "in the event that I should deny this motion." (A 116)

It is counsel's expectation that the above facts will be readily conceded by the Government at the oral argument of this appeal, after current government counsel have checked them with their former colleague, Mr. Dow.

This case is the most recent in a steady line coming before this court that uniformly uphold the need to follow the mandate of the district Plans requiring speedy retrials. These cases progressed from Drummond:

> "we will not tolerate a delay of this sort in the future" (511 F.2d at 1054)

to Roemer:

> "Measures must be taken both in the offices of the courts and the offices of the government prosecutors to flag the time requirements in all criminal cases. Failure to do so in the future will not be treated lightly." (514 F.2d at 1382)

to Yaqid:

> "In both Drummond and Roemer, we...warned that such delays in the future would not be tolerated. That future has arrived". (528 F.2d at 967)

and finally to Didier:

> "...the interim rules at issue in this case were promulgated. If they are to mean anything they must be enforced." (slip opin. p. 87)

Some of the above cases were decided when the applicable rules contained a "good cause" escape hatch, and the Court

nevertheless ruled as strongly as it did to enforce compliance with the retrial time limits. In the Interim Plan at issue here, that escape hatch had been removed (Didier, p. 78) and this Court's warnings have culminated in last October's decision in Didier. Within this entire context, the government's attempts at justifying the non-compliance with the Connecticut Plan's mandate to commence retrial no later than April 11, 1976 fail completely. The Plan was violated, and as this Court stated, if the retrial rules of the Interim Plan "are to mean anything they must be enforced."

CONCLUSION

It is respectfully submitted that the conviction herein be reversed and the indictment be dismissed with prejudice.

Respectfully submitted,

WILLIAM J. QUINLAN
Attorney for Defendant
MICHAEL J. TICHE

Dated: Schenectady, New York
November , 1976.

Affidavit of Service

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